PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

COMPLAINT COUNSEL'S MOTION TO EXCLUDE TESTIMONY FROM [redacted]

Complaint Counsel respectfully asks the Court to exclude testimony from [redacted], who Respondent unilaterally added to its Final Proposed Witness List without obtaining, or even seeking, the consent of Complaint Counsel or the permission of the Court, in violation of this Court's Scheduling Order. [redacted] is an employee of Respondent Otto Bock HealthCare North America, Inc. ("Otto Bock"), and Respondent has no good cause for failing to identify him as a witness earlier. At this late stage, with fact discovery long closed, allowing him to testify at trial would unfairly prejudice Complaint Counsel. This Court, therefore, should bar Respondent from including [redacted] on its Final Proposed Witness List.

I. Respondent Violated this Court's Scheduling Order by Including [redacted] on Its Final Witness List

Respondent's inclusion of [redacted] violates the explicit terms of this Court's Scheduling Order. The January 18, 2018 Scheduling Order ("January 18th Order") set out as

Additional Provisions the deadlines for the parties to identify potential witnesses and the procedure for supplementing those lists with new witnesses.[1] Pursuant to the January 18th Order, Respondent submitted a Preliminary Witness List on February 13, 2018[2] and a Revised Preliminary Witness List on March 9, 2018 that modified its Preliminary Witness List with the addition of certain witnesses.[3] Neither Respondent's Preliminary Witness List nor its Revised Preliminary Witness List included [redacted].

The January 18th Order was revised four times to provide new dates for certain pre-hearing deadlines, and each revised Scheduling Order, including the most recent April 26, 2018 Fourth Revised Scheduling Order ("April 26th Order"), incorporated the Additional Provisions of the January 18th Order by reference.[4] Additional Provision 15 addresses the process that the Court established for identifying witnesses that may appear at trial:

> The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or supplemental witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.[5]

The April 26th Order set May 29, 2018 as the date Respondent's Final Proposed Witness List was due.[6] As the Scheduling Order required, Respondent submitted its Final Proposed Witness

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[1] *See* Exhibit A, January 18, 2018 Scheduling Order at 7.
[2] *See* Exhibit B, Respondent's Preliminary Witness List, February 13, 2018.
[3] *See* Exhibit C, Respondent's Revised Preliminary Witness List, March 9, 2018.
[4] Exhibit D, April 26, 2018 Fourth Revised Scheduling Order at 4 ("All Additional Provisions to the January 18, 2018 Scheduling Order remain in effect").
[5] Exhibit A, January 18, 2018 Scheduling Order at 7.
[6] *See* Exhibit D, April 26, 2018 Fourth Revised Scheduling Order at 2.

List on that date, but the witness list violated the Scheduling Order by naming, for the first time, [redacted] as a potential witness.[7]

"A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded without peril."[8] The Scheduling Order, on its face, establishes an orderly pre-trial process to ensure that the parties have a fair opportunity to develop evidence and trial strategy and that the proceedings can commence as scheduled. With respect to witnesses, Additional Provision 15 commands Respondent to "notify the opposing party *promptly* of changes in witness lists."[9] Prompt disclosure of witnesses is required because it provides notice to the opposing party of the issues that it is likely to face at trial and allows the opposing party to devise a discovery plan and trial strategy to confront it. As the Court makes clear, Additional Provision 15 exists "to facilitate completion of discovery within the dates of the scheduling order."[10] Yet, though [redacted] is an employee of Otto Bock and the relevance of the generalized subject matter of his expected testimony would have been obvious from the outset of this case, Respondent did not identify him as a potential witness at any time during the discovery period.[11] Indeed, Respondent allowed more than seven weeks to pass after the close of fact discovery on April 6, 2018 before it saw fit to disclose to Complaint Counsel that it intends to call [redacted] as a witness at trial. In so doing, Respondent ignored its clear obligation under the Court's Scheduling Order.

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[7] Exhibit E, Respondent's Final Proposed Witness List, May 29, 2018 at 10. Respondent submitted an Amended Final Proposed Witness List on May 30, 2018, which included one additional witness and still named [redacted].

[8] *In re Basic Research LLC*, FTC. Dkt. 9318, Order on Respondents' Motion to Exclude Complaint Counsel Witnesses Heymsfield, Mazis, and Nunberg at 2 (Dec. 7, 2005) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) in denying Respondents' untimely *in limine* motions).

[9] Exhibit A, January 18, 2018 Scheduling Order at 7 (emphasis added).

[10] Exhibit A, January 18, 2018 Scheduling Order at 7.

[11] Respondent's only justification for including [redacted] Exhibit F, [redacted], at 1.

The Scheduling Order sets out a process for the inclusion of witnesses on a final witness list not identified in previously exchanged witness lists: the party may only include such additional witnesses with the consent of the parties, or, failing that, by an order of the Administrative Law Judge "upon a showing of good cause."[12] Respondent did neither. Respondent did not confer with Complaint Counsel and did not request consent, which Complaint Counsel cannot and would not grant at this late stage without incurring significant prejudice. Alternatively, Respondent could have sought leave of the Court to add [redacted] to its final list of witnesses, but it did not. Failure to comply with the explicit directive of this Court mandates the exclusion of [redacted] from Respondent's list of witnesses.

Had it sought "an order of the Administrative Law Judge" to include [redacted], as the Scheduling Order requires, Respondent would have had to make a "showing of good cause" explaining why he should be allowed to testify, despite having failed to identify him as a potential witness in the three and a half months that have passed since submitting a Preliminary Witness List.[13] Respondent could not have met that standard. As this Court explained in *In re Chicago Bridge & Iron Company, N.V.*, "Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension."[14] Here, there is no question that the deadlines could reasonably have been met with appropriate diligence. [redacted] identity and value as a potential

[12] Exhibit A, January 18, 2018 Scheduling Order at 7.
[13] Exhibit A, January 18, 2018 Scheduling Order at 7.
[14] *In re Chicago Bridge & Iron Co., N.V.*, FTC Dkt. 9300, Order on Respondents' Motion to Strike Witnesses at 3 (Oct. 23, 2002) (citing *Bradford v. Dana Corp*, 249 F.3d 807, 809 (8th Cir 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed R. Civ. P. 16 Advisory Committee Notes (1983 Amendment)). In *Chicago Bridge & Iron*, this Court ruled that Complaint Counsel could not present testimony from two witnesses who were omitted from Complaint Counsel's preliminary witness list but included on their final witness list, because Complaint Counsel did not demonstrate good cause for adding the witnesses to the final list.

witness, as an employee of Respondent, were undoubtedly known at the time its Preliminary Witness Lists were prepared. There is simply no reason why Respondent could not have included [redacted] on its Preliminary Witness List or a revised preliminary witness list.

II. Complaint Counsel Would Be Prejudiced if [redacted] Were Allowed to Testify at Trial

The time for identifying new witnesses has long passed. Respondent only notified Complaint Counsel on May 29th that it intends to call [redacted] at trial, more than seven weeks after the close of fact discovery. With fact discovery now closed, expert witness reports exchanged, and Proposed Final Witness Lists and Exhibit Lists settled upon, Complaint Counsel cannot conduct the discovery and planning required to confront [redacted] testimony. [redacted] name appeared nowhere in Respondent's initial disclosures and he was not among the custodians whose files Respondent searched for documents in response to Complaint Counsel's discovery requests.[15] [redacted] has not been deposed in this matter, so his deposition testimony was not available to expert witnesses in forming their conclusions or preparing their reports.

Respondent suggests that it would not object to making [redacted] available for deposition, "in person or by phone," at some point prior to trial.[16] That offer is wholly insufficient to cure the harm if the untimely addition of this new witness is permitted. Reopening discovery to allow the deposition of late-disclosed witnesses necessarily imposes

[15] In response to every Request for Production that Complaint Counsel issued, Respondent noted that it only searched the files of a subset of employees of Respondent, which did not include [redacted]. *See e.g.*, Exhibit G, [redacted].

[16] Exhibit F, [redacted], at 2.

costs at a point when trial preparation and strategies have been, or are being, finalized.[17] It also would "undermine the very objectives underlying the disclosure and supplementation requirements" and "countenance lackadaisical compliance with discovery by one party to the detriment of the other when it is always uncertain what could or would have been accomplished if timely disclosure had been made."[18]

III. Respondent Attempts to Rationalize Its Failure to Identify [redacted] as a Witness by Improperly Pointing to an Overly Broad Catchall Provision on Its Preliminary Witness List

Despite the fact that it did not name [redacted] as a potential witness at any time prior to submitting its Final Proposed Witness List, Respondent asserts that he was effectively, if indirectly, identified via a catchall provision in its Preliminary Witness List.[19] Specifically, Respondent claims that, because its Preliminary Witness List included a catchall reference to Complaint Counsel's initial disclosures, and because Complaint Counsel's initial disclosures identified [redacted][20] as potential sources of discoverable information, Respondent satisfied its obligation to identify [redacted] as a potential witness as required by this Court's Scheduling Order.

Respondent's argument strains credulity. As this Court has made clear, the purpose of the initial disclosures is to identify the universe of individuals having "discoverable knowledge," whereas "the purpose of the preliminary witness list is to further discovery by identifying the

[17] *Aldrich v. Indus. Cooling Solutions,* No. 14-03206, 2016 WL 879675, at *4 (D. Colo. Mar. 7, 2016) (finding depositions of new witnesses inadequate even though the trial was five months away and depositions could be scheduled quickly enough so that the trial would not be disrupted).
[18] *Id.*
[19] Exhibit F, [redacted], at 2.
[20] Exhibit I, Complaint Counsel's Initial Disclosures, January 18, 2018 at 53.

universe of *potential* witnesses" after those initial disclosures have been made.[21] Identification of potential witnesses "alert[s] an opposing party of the need to take discovery of the named witness."[22] A general reference to an enormous group "does not mean that [Complaint Counsel] should have anticipated that [Respondent] would call these witnesses as trial witnesses and deposed them accordingly."[23] To meet their obligations and avoid sandbagging their opponents, "parties must make an unequivocal statement that they may rely upon an individual on a motion or at trial."[24]

Here, there is no dispute that [redacted] was not named as a potential witness prior to his appearance on Respondent's Final Proposed Witness List. Were its position tenable, Respondent would be free to call any of the more than seven thousand current and former Otto Bock employees and officials at trial. Of course, if a preliminary witness list actually included over seven thousand witnesses, the list would be so broad as to subvert the disclosure process. A catchall reference incorporating thousands of individuals on the opposing party's initial disclosure is not a surrogate for the timely disclosures and compliance with this Court's Scheduling Order required for orderly discovery. Indeed, this Court recently barred parties from calling at trial witnesses who were not specifically listed by that party, but only "identified" by a catch-all provision.[25] That holding underscores that "catch-all" provisions in witness lists do not provide a back door around the requirement that witnesses a party intends to call be specifically identified on the party's witness list at the time provided by the scheduling order.

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[21] *In re The Dun & Bradstreet Corporation*, FTC Dkt. 9342, Order on Respondent's Motion to Require Amended Preliminary Witness List at 3 (Jul. 15, 2010).
[22] *Badolato v. Long Island R.R. Co.*, No. 14-1528, 2016 WL 6236311, at *4 (E.D.N.Y. Oct. 25, 2016) (citation omitted); *Degelman Indus., Ltd. v. Pro-Tech Welding & Fabrication, Inc.*, No. 06-CV-6346, 2011 WL 6754059, at *2 (W.D.N.Y. June 8, 2011).
[23] *Sivolella v. AXA Equitable Life Ins. Co.* No. 11-4194, 2016 WL 75059, at *2 (D.N.J. Jan. 6, 2016) (Arpert, M.J.) (quoting Eli Lilly, 2010 WL 1849913, at *4).
[24] *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 73 (E.D.N.Y. 2012) (collecting cases).
[25] Exhibit H, *In re Tronox Ltd.*, Final Pretrial Conference, May 16, 2018 at 15:13-17:6.

IV. Conclusion

For the foregoing reasons, Complaint Counsel respectfully requests that the Court exclude testimony from [redacted].

Dated: June 4, 2018

Respectfully Submitted,

/s/ Daniel Zach
Daniel Zach
Stephen Mohr
Steven Lavender
Lisa DeMarchi Sleigh
Catherine Sanchez
Amy Posner
Lynda Lao
Steven Rodger
Dylan Brown
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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)

Pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice, Complaint Counsel and Counsel for Respondent met and conferred in good faith in an effort to resolve by agreement the issues raised in this motion and have been unable to reach such an agreement.

On May 29, 2018, Respondent Counsel served Complaint Counsel with its Final Proposed Witness List. *See* Exhibit E. Complaint Counsel discovered the addition of [redacted] and immediately emailed Respondent to confirm that [redacted] had not appeared on any prior Preliminary Witness List. Exhibit F.

On May 30, 2018, Respondent Counsel replied, stating [redacted] Exhibit F. Complaint Counsel's Initial Disclosures include [redacted] *See* Exhibit I.

Also on May 30, 2018, Complaint Counsel replied to Respondent, expressing concern that [redacted] Exhibit F. Complaint Counsel noted that it does not consent to the inclusion of [redacted] on Respondent's Final Proposed Witness List, and pointed out that the Court had not ordered his inclusion upon a showing by Respondent of good cause. Exhibit F. Complaint Counsel requested that Respondent agree to remove [redacted] from its Final Proposed Witness List. Exhibit F.

On May 31, 2018, Respondent Counsel replied to Complaint Counsel, but did not agree to remove [redacted] from its Final Proposed Witness List. Exhibit F.

Dated: June 4, 2018

Respectfully Submitted,

/s/ Daniel Zach
Daniel Zach
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Lisa DeMarchi Sleigh
Catherine Sanchez
Amy Posner
Lynda Lao
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Counsel Supporting the Complaint

UNITED STATES OF AMERICA
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In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

PROPOSED ORDER

After reviewing Complaint Counsel's Motion to Exclude Testimony from [redacted], it is hereby ordered that Respondent may not offer testimony into evidence from [redacted].

D. Michael Chappell
Chief Administrative Law Judge

DATED this ____ day of June, 2018

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

DECLARATION OF DANIEL ZACH IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO EXCLUDE TESTIMONY FROM [redacted]

I, Daniel Zach, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am a Deputy Assistant Director at the Federal Trade Commission. I am licensed to practice law in the State of New York. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as Exhibit A is a true and correct copy of the January 18, 2018 Scheduling Order.

3. Attached as Exhibit B is a true and correct copy of Respondent's February 12, 2018 Preliminary Witness List.

4. Attached as Exhibit C is a true and correct copy of Respondent's March 9, 2018 Revised Preliminary Witness List.

5. Attached as Exhibit D is a true and correct copy of the April 26, 2018 Fourth Revised Scheduling Order.

6. Attached as Exhibits E is a true and correct copy of Respondent's May 29, 2018 Final Proposed Witness List.

7. Attached as Exhibit F is a true and correct copy of [redacted].

8. Attached as Exhibit G is a true and correct copy of Respondent's February 20, 2018 Responses to Complaint Counsel's First Set of Requests for Production.

9. Attached as Exhibit H is a true and correct copy of the transcript from the May 16, 2018 Final Pretrial Conference in *In re Tronox Ltd.*

10. Attached as Exhibit I is a true and correct copy of Complaint Counsel's January 18, 2018 Initial Disclosures.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 4th day of June 2018 in the District of Columbia.

/s/ Daniel Zach
Daniel Zach

EXHIBIT A

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Otto Bock HealthCare North America, Inc., a corporation, Respondent.	DOCKET NO. 9378

SCHEDULING ORDER

January 30, 2018	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
February 2, 2018	-	Complaint Counsel provides expert witness list.
February 6, 2018	-	Respondent's Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
February 12, 2018	-	Respondent's Counsel provides expert witness list.
February 28, 2018	-	Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
March 2, 2018	-	Deadline for supplementing preliminary witness lists.
March 15, 2018	-	Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
March 30, 2018	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.

April 9, 2018	-	Deadline for Complaint Counsel to provide expert witness reports.
April 13, 2018	-	Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 24, 2018	-	Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
April 24, 2018	-	Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 24, 2018	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1] *See* Additional Provision 7.

[1] Appendix A to Commission Rule 3 31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

May 3, 2018	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
May 7, 2018	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
May 7, 2018	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
May 11, 2018	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
May 14, 2018	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
May 14, 2018	-	Complaint Counsel files pretrial brief supported by legal authority.
May 14, 2018	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence.
May 14, 2018	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
May 14, 2018	-	Exchange proposed stipulations of law, facts, and authenticity.
May 16, 2018	-	Respondent's Counsel files pretrial brief supported by legal authority.
May 18, 2018	-	Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one

business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

May 22, 2018 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the docket number and the title of the submission.** The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9378" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are strongly discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Id. (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental. Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 days of reaching an impasse.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information. If any federal court proceeding related to this administrative proceeding is initiated, any discovery obtained in this proceeding may be used in the related federal court litigation, and vice versa.

12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. The parties need not separately notice the deposition of a non-party noticed by an opposing party. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition shall be divided evenly between them, but the noticing party may use any additional time not used by the opposing party. If no party makes such a request, cross-examination of the witness will be limited to one hour.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 business days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or supplemental witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years, and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;

(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

20. An expert witness's testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

21. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

22. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

23. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

24. Complaint Counsel's exhibits shall bear the designation PX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation PXD and Respondent's demonstrative exhibits shall bear the designation RXD or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

25. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial and to provide the exhibits to the court reporter. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if PX100 and RX200 are different copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 18, 2018

EXHIBIT B

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT C

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT D

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Otto Bock HealthCare North America, Inc., a corporation, Respondent.	Docket No. 9378

ORDER GRANTING JOINT MOTION TO MODIFY THE SCHEDULING ORDER AND ISSUING FOURTH REVISED SCHEDULING ORDER

On April 25, 2018, the parties filed a Joint Motion to Modify the Third Revised Scheduling Order ("Motion"). The Motion seeks to extend the remaining pre-hearing deadlines to reflect the revised hearing date of July 10, 2018.[1] Based on the new date for the hearing, the parties have demonstrated good cause for further revising the scheduling order. Accordingly, the parties Motion is GRANTED.[2]

The remaining pre-hearing deadlines are hereby revised as follows:

May 8, 2018	-	Deadline for Complaint Counsel to provide expert witness reports.
May 18, 2018	-	Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

[1] The April 24, 2018 Order Granting Joint Motion to Reschedule the Date for the Hearing reset the date for the hearing in this case from June 1, 2018 to July 10, 2018.

[2] Except for the date for the Final Pre-Hearing Conference, the deadlines set forth in the Fourth Revised Scheduling Order are the dates proposed by the parties.

		Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
May 23, 2018	-	Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
May 29, 2018	-	Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
May 29, 2018	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[3] *See* Additional Provision 7.
June 1, 2018	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's

[3] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

		rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
June 11, 2018	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
June 11, 2018	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
June 13, 2018	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
June 19, 2018	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
June 20, 2018	-	Complaint Counsel files pretrial brief supported by legal authority.
June 21, 2018	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence.
June 21, 2018	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
June 22, 2018	-	Exchange proposed stipulations of law, facts, and authenticity.
June 27, 2018	-	Respondent's Counsel files pretrial brief supported by legal authority.
July 9, 2018	-	Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of

stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

July 10, 2018 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

All Additional Provisions to the January 18, 2018 Scheduling Order remain in effect.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: April 26, 2018

EXHIBIT E

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT F

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT G

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT H

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT I

CONFIDENTIAL – REDACTED IN ENTIRETY